United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-7145

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ, and FELIX E. SANTOS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

- against -

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS BRIEF

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UNITED STATES COURT OF APPEALS
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BRIEF AMICUS CURIAE

PRELIMINARY STATEMENT

The plaintiffs brought an action on May 3, 1976, by Order to Show Cause in the United States District Court, Southern District of New York, and moved for a preliminary injunction restraining the New York City Police Department from firing or recalling any police officers until seniority lists are reordered to accord the plaintiffs

the seniority they would have had but for defendants' discriminatory practices. Plaintiffs sought certification of a class consisting of black and Hispanic officers and requested a temporary restraining order and a preliminary injunction with respect to both the entry level examination and the height requirements.

The Court denied the application for the temporary restraining order. A hearing on the application for preliminary injunction was held May 12, 1976. At the hearing, defendants moved to dismiss the complaint alleging statute of limitations, laches and lack of subject jurisdiction. The Court denied the motion and the hearings continued intermitently until July 29, 1976.

In the early part of July, 1976, plaintiffs renewed their application for a restraining order after having heard that the New York City Police Department intended to recall previously layed off police officers and by the renewed application, they sought to bar such recall pending a determination of the rights of the black and Hispanic officers in this litigation. The Court denied the application on the basis of an affidavit of MICHAEL J. CODD, Police Commissioner, which stated that all police officers who might be recalled were to be notified of their rights to employment were subject to the determination of the pending litigation.

On March 17, 1976, United States District Court, Southern

District of New York, ROBERT L. CARTER, D.J., granted plaintiffs' motions for certification of a plaintiff class and for a preliminary injunction with respect to both the entry level examinations and the height requirements. The Court found both the entry level examinations and the height requirements violative of Title VII of the Civil Rights Act of 1964.

The defendants appeal from that order but do not appeal from that part of the decision of the District Court which held that the examinations did not constitute discrimination.

QUESTION PRESENTED FOR REVIEW

On June 25, 1975, because of the recurring fiscal crises affecting the City of New York, the New York City Police Department was required to cut its budget, resulting in the discharge of 2864 police officers, pursuant to the last hired, first fired, seniority system in force in the New York City Police Department. Of those discharged, 21.5 percent were minorities and the plaintiffs complained that the discharges in effect perpetuated the defendants' past discriminatory practices and violated the plaintiffs' rights under the Fourteenth Amendment, Title VII, and 42 U.S.C. Sec. 1981 and 1983.

The past discriminatory practices complained of and upon

which the plaintiffs base their case are those examinations for the position of police officer utilized prior to 1972. The plaintiffs do not challenge the only examination prepared after the 1972 amendment to Title VII, namely, the one given in 1973.

Inasmuch as the Court below found that there was no invidious discrimination as proscribed by the Fourteenth Amendment to the Constitution, and which finding is not appealed by the defendants, the question will be omitted herefrom.

The plaintiffs allege:

1. The seniority system in effect in the New York City Police Department violates their rights conferred by Title VII as amended;
2. The same seniority system perpetrates past discriminatory hiring practices of the New York City Police Department; and
3. That the lay-offs of police officers in 1975, pursuant to the same seniority system, brings the alleged pre-act discrimination within the scope of Title VII as amended.

The questions presented for review in their simplest terms, are:

1. Was it the intent of Congress to make Title VII, as amended, prospective or retroactive in its application.

2. Does Title VII, as amended, apply to facially neutral seniority systems, which existed prior to the 1972 amendment.

3. Is a post-act discriminatory practice a prerequisite to trigger the provisions of Title VII as amended.

POINT I

IT WAS NOT THE INTENT OF THE CONGRESS THAT TITLE VII AS AMENDED BE RETROSPECTIVE AND NOT PROSPECTIVE.

In order to ascertain the intent of the Congress concerning any legislation it is necessary to have recourse to the memoranda, letters and opinions, written or expressed, by those members of the Congress most involved with the enactment.

The Supreme Court in Franks v. Bowman Transportation Company, 424 U.S. 747 (1976), commented on the paucity of the Congressional papers available to it so that the Court might be guided in interpreting the trust of the effect of the 1972 Amendment to Title VII. The Court, did however, greatly rely upon the memorandum of Senators Clark and Case which it included in toto as footnote 15 in its opinion, at page 759, and upon the memorandum of the Justice Department which the Court also included in toto as footnote 16 of its opinion.

The memorandum of Senators Clark and Case reads as

follows:

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business had been discriminatory in the past and as a result has an all white working force, when the title comes into effect, the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged - or indeed permitted - to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."

The memorandum of the Justice Department reads as follows:

"First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the lease by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole,' he is not being discriminated against because of his race."
"****If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title.**** But in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII****"

The same rationale underlies the decisions of this Court in Monnell v. Department of Social Services of the City of New York, 532 F 2d, 259-261-2 (2nd Cir. 1976) and Weise v. Syracuse University, 522 F 2d 397, 410-11 (2 Cir. 1975).

> "We must conclude, however, that the 1972 amendment to Title VII does not apply retroactively so as to permit an award of back pay against the City in this case ****In WEISE v. SYRACUSE UNIVERSITY, 522 F 2d 397, 410-11 (2 Cir. 1975) we met the question whether Title VII was applicable to discrimination occurring before the lifting of the exemptions for educational institutions. We held that it was not retroactive, for it was 'a statute creating new rights where none had previously existed.' Judge Smith went on to note that (T)he manifest injustice of such ex post facto imposition of civil liberty is reflected in the general rule of construction that absent clear legislative intent, statutes altering substantive rights are not to be applied retroactively****In the case of city employees, on the other hand, entirely new substantive rights were created by the amendment to Title VII. We are constrained to hold, as a consequence, that back pay may not be awarded against the City or the Board of Education under Title VII for discrimination that occurred before the 1972 Amendment." (underlining supplied)

POINT II

A VALID CHALLENGE PURSUANT TO TITLE VII TO A BONA FIDE SENIORITY SYSTEM REQUIRES A SHOWING OF A POST ACT DISCRIMINATORY PRACTICE.

The 1972 amemdment to Title VII modified the definition of "person" under the act to include "governments, governmental agencies and political subdivisions."

The Court below, while dismissing the plaintiff's contention that the Fourteenth Amendment rights of the plaintiffs had been violated by the type of examination given by the New York City Police Department and citing as its authority Washington v. Davis, 426 U.S. 229 (1976), nevertheless accepted the plaintiffs' argument that the lay-off of the police officers in 1975 brought the pre-1972 alleged discriminatory practices within the scope of Title VII. As its authority, the Court relied upon Acha v. Beame, 531 F 2d 648 (2d Cir. 1976) and Monell v. Department of Social Services of the City of New York, 532 F 2d 259 (2d Cir. 1976)

The Acha case concerned female members of the New York City Police Department who were laid off in 1975. They argued that the facially neutral hiring system in effect in the New York City Police Department - last hired, first fired - actually perpetuated the past discriminatory hiring practices of the New York City Police Department and in so doing violated the statutory rights conferred by post-amendment Title VII.

In 1973 the titles of "Patrolman" and "Patrolwoman" were merged by the New York City Police Department into the title of "Police Officer." Thereafter, identical exams, both written and physical, were given to both male and female applicants. Two separate lists were thereafter prepared - one for males and one for females. Appointments as Police Officers to the Police Department were made from the separate lists in the ratio of four men to one woman in total disregard of the relative standing on the lists of the female applicants vis-a-vis the male applicants.

The Court in its decision specifically rejected the caveat contained in the memorandum of Senators Clark and Case which the Senators had supplied in clarification of the intent of Congress at the time of the enactment of the 1972 Amendment to Title VII, and which was later relied upon and accepted by the Supreme Court in Franks v. Bowman.

As a consequence, the Court found that the facially neutral hiring system, that is - last hired, first fired - actually perpetuated the past discriminatory hiring practices of the New York City Police Department and thus the lay-offs in 1975 violated the statutory rights conferred by Title VII, as amended.

Acha did not, however, specifically deal with the contention raised herein that Title VII does not apply since the only

post-Act practice complained of is the application of a neutral seniority system.

Less than a month later, this Court was presented with another challenge lodged pursuant to Title VII, as amended, in the matter of Monell v. Department of Social Services of the City of New York.

The case involved a regulation of the Department of Social Services which required pregnant women employees to take an unpaid leave of absence before medical reasons required them to do so. Plaintiffs alleged this violated the rights conferred by Title VII and claimed back pay covering the periods which plaintiffs alleged they could have been working but for the challenged rules.

In deciding the retroactivity of the amended Title VII, the Court held that Title VII does not apply retroactively; that it was not applicable to discrimination occurring before the lifting of the exemptions,and that absent clear legislative intent, statutes altering substantive rights are not to be applied retroactively (supra, Page 7).

Within thirty (30) days the Supreme Court rendered its decision in the case of Franks v. Bowman. Justice Powell

recognized that Section 703(h) required that the discriminatory practice must occur after the effective date of Title VII and that only persons who had been discriminatorily denied employment after that effective date could be awarded retroactive seniority within an otherwise neutral, bona fide seniority system.

The Court stated that:

> "The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask for modification or elimination of the existing seniority system but only for an award of the seniority status they would have individually enjoyed under the present system but for the illegally discriminatory refusal to hire. It is this context that must shape our determination as to the meaning and effect of Section 703(h)."

Elaborating on the point that the underlying wrong addressed by Title VII is a hiring system and not a seniority system, the Court appended a footnote:

> "However, only post-Act victims of racial discrimination are members of class 3. Title VII's prohibition on racial discrimination in hiring became effective on July 2, 1965, one year after the date of its enactment. Pub. L. 88-352, Section 716 (a)-(b); 78 Stat. 253."
>
> fn 10, 4359

Addressing itself to Section 703(h), the Court found:

"The thrust of the action is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that Section 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act." (Page 761-762 Section 703(h)) (underlining supplied).

POINT III

THE AMICUS-CURIAE ADOPTS ALL POINTS AND ARGUMENTS RAISED BY THE DEFENDANTS-APPELLANTS.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED.

Dated: April 14, 1977.

Respectfully submitted,

JOSEPH L. BELVEDERE
Attorney for Amicus-Curiae

JOSEPH L. BELVEDERE AND
GERTRUDE E. BELVEDERE

77-7145

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

GERTRUDE E. BELVEDERE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Carmel, New York.

That on the 15th day of April, 1977, deponent served a copy of the attached Amicus Curiae upon:

Puerto Rican Legal Defense & Education Fund, Inc.
95 Madison Avenue
New York, New York

Christopher Crowley, Esq.
Sara E. Steinbock, Esq.
1 Chase Manhattan Plaza
New York, New York 10005

W. Bernard Richland, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007

attorneys for the parties hereto, by delivering a true copy thereof to them personally. Deponent knew the persons so served to be the persons mentioned and described in said papers.

/Gertrude E. Belvedere

Sworn to before me this
15th day of April, 1977.

Joseph L. Belvedere

JOSEPH L. BELVEDERE
Notary Public, State of New York
No. 40-5255950
Qualified in Putnam County
Commission Expires March 30, 19 78

JOSEPH L. BELVEDERE AND
GERTRUDE E. BELVEDERE 77-7145

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

JOSEPH L. BELVEDERE AND
GERTRUDE E. BELVEDERE

Attorneys for

Office and Post Office Address
4518—11TH AVENUE
BROOKLYN, N. Y. 11219

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,

JOSEPH L. BELVEDERE AND
GERTRUDE E. BELVEDERE

Attorneys for

Office and Post Office Address
4518—11TH AVENUE
BROOKLYN, N. Y. 11219

To

Attorney(s) for

Index No. 77-7145 Year 19

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Defendant-Appellants.

AFFIDAVIT OF SERVICE

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BROOKLYN, N. Y. 11219
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To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

3900-©1983, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4